

No. 3945.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

David G. Lorraine,

Appellant,

vs.

Francis M. Townsend, Milon J. Trumble and Alfred J. Gutzler, Doing Business Under the Firm Name of Trumble Gas Trap Company,

Appellees.

APPELLANT'S REPLY BRIEF.

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Argument of Our Opening Brief Ignored.

While the opening page of brief for plaintiff-appellees carries a main heading "Statement of the Case," there is in appellees' brief no title, "Argument." In fact all other headings throughout the brief appear as subdivisions of plaintiffs-appellees' "Statement of the Case." This error of classification, however, need not confuse as an examination of the context shows

that the argument proper begins with the first sentence beginning at the 5th line from the bottom, page 4, of plaintiffs-appellees' brief—at any rate that is where we must begin it, for we find ourselves in almost total disagreement with the statements of counsel thereafter following as to the nature, scope and alleged importance of Trumble's asserted contribution to the art.

Preliminarily, as a general indicator of direction, it should be noted, that nearly four-fifths (66 of the 83 pages) of the argument of appellant's opening brief is devoted to a consideration of the art prior to Trumble in order that the court might have fully before it *evidence and reasoning* in support of our contention that the most that Trumble can claim to have added to the art (whether the addition was of even the smallest practical value by no means granted) was the idea of *spreading the whole body of the oil upon its entry into the chamber in a thin film, unbroken and unagitated, over not only an imperforate conical spreader plate, but by such spreader plate equally around and upon the walls of the expansion chamber, so that no part of the oil would fall to the bottom of the chamber without being so spread.*

When an argument cannot be squarely met, a common method is to ignore it: barely one-ninth of plaintiffs-appellees' brief (a scant seven pages out of sixty-four) are devoted to any attempted refutation of the argument which we so elaborately developed in our

opening brief. We are confident that further analysis by this court, in the light of plaintiffs-appellees' brief will show that the reason for this was that our argument on the prior art was found to be unanswerable.

The Principal Fallacy of Plaintiffs-Appellees' Brief.

It is the fallacy most to blame for the fatal errors of individuals and nations since the world began—*unsupported assertion*. Disregarding the clear showing of the evidence to the contrary (which we pointed out and dwelled upon at length in our opening brief), beginning near the bottom of page 4 of plaintiffs-appellees' brief, we find an opening of two and one-half pages relating to the nature, scope, and importance of Trumble's asserted discovery. Not a single reference to the record in support of counsel's assertions is there found, but important and even vital questions, are *brazenly begged*, namely, that Trumble had "a new object in view," "what the prior art designers of traps had in mind"; that in prior art traps "gasoline was carried away with the gas;" that with the prior art devices "loss of a considerable portion of the gasoline was a necessary incident to the separation;" that Trumble made a "striking discovery" which was "a new and unexpected principle in gas traps;" etc.

Eagerly turning these pages from page 4 of plaintiffs-appellees' brief, we search *for some reference to the record* cited as support for these important and far-reaching assertions. We find the first of such references about the middle of page 7, in support of

counsel's statement that the "industry recognized and appreciated the enormous saving" that could be afforded by the use of the Trumble trap; that such traps went into "widespread and general use, displacing other traps, and became the standard gas trap in use in the oil fields in the United States and foreign countries," that is to say, *throughout the world*. Now what is the support in the record cited for these last mentioned assertions of counsel? Why, counsel states that 583 gas traps have been sold from the time of the alleged invention of the Trumble trap (November 9, 1914), to the beginning of this suit, namely, March 22, 1922—nearly seven and one-half years—an average of *only less than seventy-eight traps a year* THROUGHOUT THE WORLD. Now, this, clearly, is *no* support for such assertion, for the reason, in the first place, we do not know how many traps are required for use throughout the world. However, beginning with the second paragraph of page 4 of plaintiffs-appellees' brief, counsel state "petroleum oil as it comes from the well generally contains more or less gas which must be eliminated before the oil is suitable for commercial purposes." Thus, under counsel's statement, practically all wells, in order to produce oil suitable for commercial purposes must have some device for separating the gas, that is to say, must have a gas trap. There appears to be no evidence in the record of how many wells are in operation throughout the world, but anyone who has even glanced over just one of the large oil fields, or has

even seen a picture of an oil field will readily have an inkling of the preposterously insignificant proportion than an average of *only seventy-eight gas traps per year* bears to the total number of wells in operation.

Thus, the statement, that the use was “widespread,” “general” or “standard” or that such traps displaced other traps, as asserted by counsel, carries on its face its own refutation.

Of course, even if a large proportion of the gas traps used throughout the world were traps made in accordance with the Trumble specifications and drawings, this would by no means be conclusive as to the value of any infinitesimal contribution of Trumble to the art; for it might well be that the sales were due to persistent advertising, to the fact that the Trumble trap was of recognized value *only insofar as it incorporated devices long and well known in the prior art*. Dealing with a necessary and staple article, if Trumble was a leading manufacturer, aggressively advertising his product, assiduously copying those things demonstrated to be of value in the art, he would, of course, sell many traps. *Someone* would have to supply the large demand, and it might as well be Trumble. However, the admittedly pitifully small actual output of Trumble traps testifies louder than mere words to the fact that Trumble after seven and one-half years' effort has failed miserably as a competitor with manufacturers of other gas traps throughout the world.

We submit that the immediately foregoing discussion furnishes a most impressive warning against unsupported statements of counsel. If the first citation to the record so grossly fails as support, how can we place any confidence whatever in the preceding two pages in which possible evidential support is not even suggested?

Counsel's Assertion (Middle of Page 7, Plaintiffs-Appellees' Brief) That One of the Trumble Traps Saved Over Forty-Five Thousand Dollars a Year for the Honolulu Oil Company Is Misleading, in That It Implies That Such Saving Was the Result of the Employment Only of the Trumble Alleged Invention. The Witness Paine in so Testifying Was Not Comparing the Operation of the Trumble Trap With Any Other Trap, but Merely Testifying That the Amount Saved Was the Result of the Employment of a Gas Trap as Compared With the Employment of No Gas Trap Whatever.

An even more striking example of the zeal of counsel which overreaches is found beginning at the middle of page 7 of appellees' brief, where counsel asserts:

"The importance of these traps to the oil industry may be appreciated from the testimony of the witness Paine, to the effect that one of these traps alone saved \$125.00 per day (over \$45,000 a year) for the Honolulu Oil Company at Taft, California."

Counsel's reference [R. 117] immediately following this statement is erroneous: the correct reference seems to be the last part of answer at R. 79.

Now, the immediately foregoing statement of counsel and the quotation and discussion of the witness Paine's testimony which follows (beginning page 7 of plaintiffs-appellees' brief) is obviously set forth by counsel for plaintiffs-appellees as proof that Trumble's contribution to the art resulted in this great saving. The argument is implied that if Trumble had produced a device which leads to such wonderfully advantageous results it must have great merits, and that this court should go to great lengths to reward such merit by such an interpretation of the Trumble claims as will avoid anticipation and find infringement.

The impression that one gains from a reading from counsel's said discussion is *that the Trumble trap did something that prior traps could not and did not accomplish, namely, the saving of \$125.00 per day for the Honolulu Oil Company. As we shall immediately show, any such impression is entirely mistaken and should be guarded against. Paul Paine was not comparing the Trumble trap with any other trap.*

In effect, Paine's testimony is simply that the use of a gas trap saved \$125.00 per day over the use of no gas trap. In other words, the Paine testimony merely supports an argument that a gas trap was needed and its employment by the Honolulu Oil Company profitable. Thus, at R. 70, Paine testifies that he installed the first Trumble gas trap in 1915; that

previous to this he had noted the operation of such a trap on the adjoining property.

At R. 71, he says, that prior to the installation of said Trumble Gas Trap *the gas was allowed to escape into the atmosphere and was entirely lost*. The witness then proceeds to testify [R. 71] as to general conditions at the well, and as to the effect of pressure, the substance of which is merely that the use of pressure increased the value of the oil by keeping in the oil the lighter series. If Paine had been conversant with the art prior to the time he made his first observation, he would have known what the Circuit Court of Appeals for the 8th Circuit in *Standard Oil Company v. Oklahoma Natural Gas Company*, 284 Fed. 469—cited in our opening brief and quoted from at page 21—when in speaking of the Saybolt patent granted in 1911, many years before Trumble found:

“Saybolt knew from the law of Henry the function that pressure would perform in the absorption of gasoline vapor from natural gas. The pressure of natural gas already existed to the knowledge of every one.”

It is clear that the evidence, authority, and argument of our opening brief are not met by counsel—they are ignored.

Again we find at the middle of page 9, plaintiffs-appellees' brief, the following statement:

“While it is now possible for Mr. Paine to point out the reasons for the success of the Trumble invention, there is no evidence in the prior art to indicate that this was understood or appreciated prior

to Trumble's practical application of this then unknown result and his disclosure of the same to the art."

As we have seen, Mr. Paine did not point out any reason for the alleged success of the Trumble pretended invention which *was not equally a reason for the success of any of the prior art traps in evidence*. It is not true that there is no evidence in the prior art to indicate that this was not understood or appreciated as asserted by counsel. As we have shown the court in discussing the prior art patents in our opening brief—take the McIntosh patent only as an instance,—McIntosh distinctly provided for reducing the oil to a thin film and subjecting it while so spread out to pressure, stating in his specification that the gas is thereby "freed and collected in the gas chamber." (See quotation from the McIntosh specification, bottom of page 48, of appellant's opening brief, and particularly the last line of such quotation.)

We deny the assertions of counsel at page 10 of plaintiffs-appellees' brief, as to the invention by Lorraine of a "valve adapted for installation on a trap of the Trumble type." We notice that counsel has cited no reference to the record where such assertions are supported. What Lorraine invented is fully shown and described in his letters patent beginning at page 66 of the Book of Exhibits. The Lorraine patent covers expressly—not a valve or valves as stated by counsel—but "an Oil, Gas and Sand Separator."

At plaintiffs-appellees' brief near the top of page 12 counsel have fallen into error concerning the proper interpretation of the testimony relating to pressure in defendants' device. The fact is that the evidence first related to a trap put out by defendants which had not been equipped with a pressure valve; later other testimony was introduced relating to another trap which did contain the pressure valve, whereupon counsel for defendant stipulated to the fact.

At plaintiffs-appellees' brief, page 17, we find counsel insisting that pressure was novel and original with Trumble, stating (plaintiffs-appellees' brief, bottom page 16), "Judge Wolverton considered all the evidence and explicitly found as a fact that the maintenance of pressure on a trap for the purpose above stated was novel and original with Trumble." Now, in the first place, the word "explicitly" overstates the finding of the trial judge. The fact is that Judge Wolverton was *very uncertain* in expressing himself in this regard. He did *not find*, he only states that he *thought* [Tr. of Rec., bottom p. 538, Court's Opinion] that the prior art patents contained no element of pressure. In this surmise we have seen in our opening brief the trial judge was in error.

Again, counsel's statement near the top of page 17, plaintiffs-appellees' brief, is reckless and mistaken where they assert that there was no testimony given or claim made before the trial court to the effect that the use of pressure in the trap was not novel or original with Trumble; for at Record, page 426, for

instance, the witness Trout on behalf of defendant-appellant testifying concerning a prior art trap expressly describes and marks on a drawing produced by him the back pressure valve, which Mr. Lyon suggested should be marked "4." Again at Record, page 448, the witness Swoap, testifies to the use of a trap in 1897, in which pressure was employed together with the other elements in controversy.

However, the question of whether or not there was any *testimony* in the case to the effect that pressure was old before Trumble is a false issue, because our main contention was that *prior patent documents, not necessarily testimony* established the antiquity of such pressure in gas traps. So conclusive was the showing of these prior patents, that we have not squandered the court's time by pointing out the testimony of Trout and Swoap as to the state of the art. Counsel was careful to use the word "testimony" and not "evidence," but even then were mistaken in view of the testimony of Trout and Swoap above mentioned.

At the bottom of page 17, plaintiffs-appellees' brief, the fact adverted to that the witness Paine "felt his way along to see what the effect [of pressure] would be," merely emphasizes the fact admitted by Mr. Paine, that he had never had any experience with gas traps before he installed the first Trumble trap in 1915. About all he knew was that such things existed, but he had never experimented with them.

Counsel's Attempt to Define the Alleged Trumble Invention.

At plaintiffs-appellees' brief, page 19, counsel state:

"The Trumble invention comprises discovery or conception that a gas trap, if maintained under pressure will prevent the loss of gasoline without interfering with the separation of the gas from the oil."

If counsel are correct then the alleged invention is *not patentable subject matter*. Only arts, *i. e.*, processes, machines, manufactures, or compositions of matter, and their improvements are patentable. (Sec. 4886, R. S. U. S.) The discovery that if a gas trap were maintained under pressure gasoline would be saved does not belong to the classes of things for which patents may be legally granted.

Of course, this is merely one of those subtle attempts to get away from the subject-matter of the claims. It is elementary that a patentee is bound by his claims. (Walker on Patents, 5th Ed., Sec. 176.)

After the smoke of patent litigation has somewhat cleared away, and it is seen just what the state of an art is, it is not permissible to gather from the debris a few hazy generalities and reconstruct them into a patent claim.

Counsel's argument under the heading, "The Trumble Invention" (Plaintiffs-Appellees' Br., p. 19) most clearly shows the fact to be as we have stated in our opening brief (p. 79) namely, that after its escape through the Patent Office it is now attempted

to construe the Trumble patent as covering broadly only surface and pressure. In other words, the claims if so rewritten would be: "a separator in which the oil is spread to any degree whatever upon any surface and subjected to pressure."

Assume, for the sake of argument, that none of the prior art patents *did* mention or describe pressure. This would not be determinative of the question of infringement, for Trumble in the proceedings before the Patent Office distinctly limited himself to imperforate spreader plates for spreading all the oil to the outer edge of the vessel without breaking up or agitation, and causing it to flow wholly down the walls of the separator. Irrespective, therefore, of the question of pressure, defendant-appellant does not infringe; for he does not use this spirit of invention as there defined.

On page 20 plaintiffs-appellees' brief, a so-called "narrower aspect" of the Trumble alleged invention is mentioned, namely, to "slow down and spread out the oil in its passage through the trap." Note how counsel have here overlooked the question of infringement. In defendant-appellant's device there is no slowing down of the oil. A large part must drop to the bottom of the separator, without being retarded or spread.

In order to show the strength of our position, let counsel for appellees define the pretended invention of Trumble as they please—let them rewrite the claims if they choose—then compare with the prior art, and

it will always be found that if such claims are broad enough to include defendant's devices they will be anticipated. *In other words, an invention is not mere words and cannot be constructed of thin air.*

The so-called "broadest aspect" of the alleged Trumble invention is distinctly found in Cooper, McIntosh, Newman, and other patents of record; the alleged "narrower aspect" is found in all prior art patents discussed in our opening brief.

The Court's Duty to the Public.

There seems to be a theory pervading plaintiffs-appellees' brief, that because defendant-appellant in the trial court did not rely upon defenses attacking validity, that the way is thereby open to totally disregard the prior art, and to stretch the claims to almost any length. Now, of course, the public interest as well as private interests are represented by defendant-appellant. The right of the public to buy its gas and oil separators which employ those things which are old without the imposition of a royalty, is fully as much entitled to the protection of this court as the right of a patentee. If a patent is valid a patentee stands in the same light as the grantee of a tract of land from the government. Merely because there has been a grant, is no reason why we should totally disregard its metes and bounds. The grantee should have exactly what the spirit and intent of his instrument of title covers and no more. If it is clear that the public owns adjoining property care should

be taken not to place such an interpretation upon the grant as will appropriate public domain.

Even if counsel were correct in their statement (Plaintiffs-Appellees' Br. middle of p. 21), that Trumble made a "striking discovery * * * that pressure if maintained in a gas trap, would maintain the gasoline in the body of the oil without interfering with the separation of the gas" (which is certainly not true as shown by the evidence) this would no more entitle Trumble to a disregard by this court of the metes and bounds of the grant of his patent as construed in the light of the prior art than it would entitle any public benefactor whose claim for public land was before the court for adjudication to a disregard of the law.

The assertions of counsel as to the "great value," "striking discovery," etc., of Trumble, should not, however, confuse the court. The fact is that Trumble's alleged contribution to the art is so small that one has difficulty in finding it. Trumble did not invent pressure. Trumble did not first apply pressure in a gas trap. He did not first devise means for slowing the flow of the oil. He did none of those things asserted by counsel.

Defendant-Appellant's Devices Do Not Infringe.

We are pleased to note that the accuracy of our description (Defendant-Appellant's Br., p. 81 *et seq.*) of defendant's devices is not questioned in plaintiffs-appellees' brief. As we stated in appellant's opening

brief, the drawings were made to scale, and we strenuously endeavored to set forth a clear description which could be accepted by counsel for plaintiffs-appellees. In this it appears we have succeeded. We regret, however, to note that there is a slight question as to our description of the *operation* of the so-called Model No. 1, found in plaintiffs-appellees' brief at the bottom of page 34 where counsel state: "The splashing of the incoming oil in Model No. 1, is not supported by any evidence in the case whatsoever and is the voluntary imagination of appellant's counsel." In this criticism counsel for plaintiffs-appellees have fallen into error, *as it was distinctly found by the trial court* that the part of the oil in model No. 2 [Tr., bottom of p. 537; quoted Defendant-Appellant's Op. Br., top of p. 87]—which is the same as model No. 1, except that the nipple is closer to the wall—descended by gravity *without reaching either wall*. Furthermore, as we point out near the top of defendant-appellant's opening brief, page 91, the court at transcript of record, page 541, upon this question of splashing said: "while part of the oil is reduced to a spray and falls by gravity to the fluid below, its action does not obviate the objectionable feature to a part flowing down the partition and a part down the wall." It is therefore clear that counsels' only criticism of our description of both the construction and mode of operation is based upon error.

In the discussion under the head of "Infringement" (Plaintiffs-Appellees' Br. p. 28 *et seq.*), counsel, ignor-

ing the limitations by the prior art, as well as the admissions in the Trumble proceedings before the Patent Office; overlooking or disregarding completely the fact that under the interpretation suggested the patent in suit would be anticipated and void, urges not that the specific claims with the equivalents recognized by the Patent Office had been appropriated by the defendant, but that what in effect are *two new claims*, namely, reconstructions, labeled, respectively, "broadest aspect" and "narrowest aspect" had been adopted by defendant. Under such interpretation, if defendant uses any means for retarding the flow of the oil or any degree of pressure either separately or in combination it infringes. Of course, as we have repeatedly pointed out any such interpretation disregards the showing of the prior art which we so elaborately considered in our opening brief as well as the admission of the Trumble file wrapper contents as to the spirit and scope of the alleged invention.

Let it be noted that at the bottom of page 33 plaintiffs-appellees' brief, while counsel do not question the accuracy of our description of the diminutive atomizing device, *i. e.*, the inclined bottom of sleeve 18, which is numbered 17 in defendant's patent (Book of Exhibits, p. 67; described in our Opening Brief, p. 83), they do by the use of the term "baffle-plate" suggest that it might perform the function of Trumble's spreader cone and might spread out and slow down the oil, so as to bring it within the so-called "narrowest aspect" of the Trumble patent. If this small

atomizing bottom 17 is a baffle-plate, then the small plate of Barker, for instance, is also a baffle-plate and anticipates. Both of these plates perform the same function.

In considering the small portion of the testimony quoted by counsel at the top of page 37, plaintiffs-appellees' brief, it must be borne in mind that the court, after considering all the evidence, found with regard to this model No. 2 [Court's Opinion, Tr. of Rec., bottom of p. 537; quoted in our Opening Brief, top of p. 87] that the part of the oil fell to the bottom "without reaching either wall"; and again at transcript of record, page 541; quoted in our opening brief, near the top of page 91, that part of the oil is reduced to a spray and falls by gravity to the settled fluid below. There is no question, therefore, that *all of the oil was not spread upon any surface within the chamber* in defendant's devices, and it is also clear that the oil was agitated, sprayed, or broken up.

Alleged Validity of the Trumble Patent.

At page 40, plaintiffs-appellees' brief, counsel state:

"Notwithstanding the fact that the validity of the Trumble claims has been conceded in this case and is not in issue, and notwithstanding the clear wording of the claims, appellant's opening brief contains the discussion under the title of "Estoppel by Proceedings in the Patent Office."

In view of the fact that the trial court, in its opinion [Tr. of Rec, p. 536, $\frac{2}{3}$ down the page] said:

“I think, therefore, the patentee is not estopped by the proceedings before the Patent Office to insist upon the broader claims”—and in view of the fact that, notwithstanding the statement that validity was not in issue, the court *did* distinctly decree that the patent was valid—we fail to understand counsel’s criticism. Certainly, the proceedings before the Patent Office which we emphasized, especially in view of the Bray patent discussed in our opening brief should estop Trumble from asserting *any possible breadth of construction*; and, more than that, should preclude *Trumble from placing an interpretation upon his claims which is different from the interpretation he had to place upon them before the Patent Office to secure the allowance of his patent.*

The Prior Art.

The fallacy of counsel’s argument as to the lack of pertinence of the prior art is apparent from a consideration of the very first sentence of their discussion under this head (Plaintiffs-Appellees’ Br. p. 47) where it is said:

“In view of the fact that defendant has conceded and has failed to deny the validity of the claims of the Trumble patent in issue, and in view of the fact that these claims are certainly broad enough to include both model 1 and 2 of the infringing device, we fail to perceive any force or materiality in considering the prior art.”

Why, nothing is more elementary in the law of patents than that the prior art, even though not

pleaded is admissible. Thus, *Dunbar v. Myers*, 94 U. S. 187, holds:

“Proof of the state of the art is admissible in equity cases, without any averment in the answer touching the subject, and in actions at law, without giving the notice required when evidence is offered to invalidate the patent. It consists of proof of what was old and in general use at the time of the alleged invention; and may be admitted to show what was then old, or to distinguish what is new, or to aid the court in the construction of the patent.”

Why should the court desire to know what was old or to distinguish what was new, unless it was to construe the claims in the light of the prior art, *so as to avoid an interpretation which would trench upon the public domain?* Again, why did the trial court consider the prior art and why was evidence of the prior art admitted without objection, if it was not pertinent? We discover the *spirit* as distinguished from the *letter* of the claim by a study of a file wrapper and contents as well as by a consideration of the prior art. Having determined what was actually new (if anything) we construe the claims if possible to cover that novelty, applying it narrowly, if necessary, to the particular form of means and devices shown in the patent drawings. This gives to the patentee all he is entitled to and it protects the public in the use of those things which are old.

In the light of counsels' opening statement under this title, it is easy to understand why they have

accorded so little consideration to the main subject of appellant's opening brief.

In the middle of page 49, plaintiffs-appellees' brief, counsel suggest a false issue, as follows:

"We challenge appellant to point out this suggestion [the suggestion that pressure will hold gasoline in the oil] in any of the prior patents referred to in appellant's brief."

It is quite elementary that it is not necessary for a patentee to mention all the uses, benefits, and advantages resulting from his device or process in order to cover and secure those advantages. Thus, Walker on Patents (5th Ed.), p. 217, Sec. 175, says:

"An inventor need not explain in his description, or know in point of fact, what laws of nature those are which cause his invention to work (citing *St. Louis Stamping Co. v. Quinby*, 4 Bann. & Ard. 195, 1879; *Haffcke v. Clark*, 46 F. R. 770, 1891; *Dixon-Woods Co. v. Pfeifer*, 55 F. R. 395, 1893; *Jemolin Co. v. Harway, etc., Mfg. Co.*, 138 F. R. 54, 1905; and many other cases) nor is a patent void on the ground that the principle of the invention is not fully understood; or if understood by anyone, not understood alike by all (citing many cases) and was not understood correctly by the inventor himself (citing many cases) or that all its advantages and possibilities were not understood by or known to the inventor. (Citing many cases.) Neither is any description insufficient in the eye of the law on account of any mere errors it may be

found to contain, where those errors would at once be detected and their remedies be known, by any person skilled in the art, when making specimens of the invention set forth, or when practicing that invention, if that invention is a process (citing many cases) nor where such errors consist in mistaken statements of immaterial facts (citing many cases); nor where such errors relate to the degree of efficiency of the invention (citing cases) nor where they consist in deficient description of the functions of some parts of a machine. (Citing cases.) Nor need a description state every use to which the described and claimed invention is applicable, in order to cover every such use. (Citing many cases.)”

In other words, patents are granted for *mechanical devices, means, or things* and not for the setting forth of a catalogue of supposed advantages.

Cooper Patent.

(Discussed Plaintiffs-Appellees’ Br. p. 54 *et seq.*) Counsel have failed to meet our argument on this patent. Not only does Cooper repeatedly mention pressure, not alone in connection with the prior patents to which he refers, but in the very patent in evidence. Cooper says that his device is to be used in a pressure system. Pressure systems, as we have seen, were old. As we pointed out in our opening brief, it was no more necessary for Cooper to illustrate the means for maintaining pressure (which Trumble himself merely mentions and illustrates prospectively on

the outside, but does not describe) than it was for either Cooper or Trumble to illustrate the source of initial pressure at the bottom of the well. Remember, also, that plaintiffs-appellees' expert, Ford Harris, has testified that an absorption plant at the end of the line, or boilers, or other place of use (quoted page 20, our opening brief) would cause pressure in the trap. Cooper distinctly tells us (line 68, page 1, of his specification—Book of Exhibits, p. 134): "the gas rises and passes through the pipe F to the compressor." The compressor, under Ford Harris' testimony would back up pressure. Furthermore, Harris says (quotation, bottom page 19, appellant's opening brief) that pipe friction would back up pressure. Cooper's statement, therefore, that the gas passes *through a pipe* to the compressor, under the testimony of Harris indicates a pressure means in addition to the compressor.

Counsel's criticism (Plaintiffs-Appellees' Br., top of p. 56) that Cooper operates on a different principle, namely, centrifugal separation, is unmerited. Furthermore, it does not affect the pertinence of Cooper for the reason, that mere *addition* to a patented thing does not change its patentable character nor avoid anticipation or infringement. This rule, we believe, is obvious, but see Walker on Patents (5th Ed.), Sec. 338, 347, 367. Cooper spreads the oil in a thin film on the wall, at the same time subjecting it to pressure. Now, if he gives to the oil a swirling motion upon its entry into the chamber, thereby utilizing an additional principle as an aid to separation, he has not-

withstanding *disclosed the subject matter claimed by Trumble*. **Trumble** surely cannot, by *foregoing one of the advantages of Cooper* and utilizing less than the complete **Cooper** disclosure, claim novelty and invention in the part appropriated.

There is no evidence as stated by counsel that **Cooper** was "a mere paper patent," and the argument of the witness **Paine** (plaintiffs' expert) in support of the value of a gas trap, namely, that it saved \$125.00 per day, proves that **Cooper** did contribute something of value to the art. The **Cooper** device does not operate on the principle of centrifugal action. Such action is merely incidental and additional to the spreading of the oil on the wall of the separator in a thin film and subjecting it to pressure. **Cooper** does distinctly and repeatedly recognize the use of pressure with the device. Means for maintaining pressure in **Cooper**, counsel's assertion to the contrary notwithstanding, are shown, mentioned, and described in **Cooper**.

McIntosh Patent.

Counsels' half page (Plaintiffs-Appellees' Brief, p. 57) of reply to our argument on this patent speaks eloquently of an inability to meet the clear showing of this evidence. The argument that **McIntosh** does not mention or describe the effect of pressure, *i. e.*, the advantages resulting therefrom, is met clearly by the quotation from **Walker on Patents** (5th Ed.), Sec. 175, which we have set forth *supra*, to the effect that *uses or advantages* need not be mentioned to be covered by a patent.

The suggestion that McIntosh does not enlarge upon the operation of his inverted bell as a means for maintaining pressure, is met by the fact that no one could examine the drawing and description of this patent without instantly understanding the function performed by the bell. Remember, too, that a patent description is addressed to those skilled in the art. We urge that even one unskilled in this art could understand the clear showing of this McIntosh description and drawing. Moreover, Trumble is in no position to question the sufficiency of the disclosure of McIntosh on the subject, for he does not describe the construction of his pressure valve, he only mentions its function and has illustrated merely the outside view of the device. Certainly McIntosh is as clear as Trumble as to the feature of maintaining pressure.

Newman Patent.

Counsels' suggestion (Plaintiffs-Appellees' Brief, p. 58) that there is nothing in the Newman patent to indicate that pressure is used therein, ignores the fact that Newman at line 11, page 1 of his specification, states that the object of his invention was to distribute *the force of the gas especially in high pressure*, and the fact that at line 70, page 1, Newman's specification, referring to the float, he tells us that it "thereby equalizes the pressure."

Again we point out there is a pipe line from the Newman separator, which under plaintiffs' expert Harris' testimony, will back up pressure in the trap.

Taylor Patent.

It is just as reasonable for counsel to assert that Taylor shows no means for maintaining pressure as it would be for us to point out that Trumble illustrates no means for producing the initial pressure from the well—namely, the bottom of the well.

Steam, of course, *is a gas*; and thus, the Taylor device is for the purpose of separating gas and oil. On the Trumble application it was adjudicated by the Patent Office (by its citation by the examiner) to be pertinent art, and Trumble did not object to its consideration, and raised no point that it could not be used for the separation of the products of an oil well. Of course, such a device could not be placed in position between the boiler and steam chest of an engine without having constant boiler pressure within the chamber.

The true difference between Taylor and Trumble was properly pointed out in the discussion before the Patent Office. That difference only related to the breaking up or agitation of the oil. We submit that conclusively this patent requires the adoption of the interpretation placed by Trumble upon his claims before the Patent Office. Under such interpretation it is clear that defendant-appellant does not infringe.

Barker Patent.

(Discussed Plaintiffs-Appellees' Br., p. 59.) Counsel opens discussion by the statement, "This patent

does not disclose a gas trap." This is clearly a mistake. The patent is entitled "NATURAL GAS SEPARATOR." True, the separation of gas from water is more emphasized by Barker than that of other products, but counsel evidently overlooks the fact that the Trumble devise also mentions *as a first object* (Trumble's specification, p. 1, line 13) the separation of gas from not only oil, *but water*.

During the prosecution of the Trumble application through the Patent Office, when this Barker patent was cited, it was not objected that it was not pertinent. On the contrary, Trumble at that time recognized it as a proper citation and did not attempt to distinguish it except on the ground of structural differences. Thus, both the Patent Office and Trumble agreed that Barker was a pertinent citation, and the present suggestion of counsel is totally inconsistent with such accord before the Patent Office.

Again counsel is mistaken in asserting "there was no means shown in the Barker device for spreading the incoming water so as to allow escape of gas therefrom." There is indicated by Barker a very similar atomizing plate (namely, plate 7 of the Barker patent) to the bottom 17 of the sleeve 18 of the Lorraine patent. Both of these devices have the same effect. If the Barker device is not capable of the function of the Trumble separator, as stated by counsel, then defendant's devices, which in large part atomizes and sprays the oil without spreading it upon

any wall or surface within the chamber, are not infringements, as they, too, must be incapable of performing the function of the Trumble separator.

Bray Patent.

Counsel places much emphasis upon the fact that Bray provides in addition to the pipe 17 (which notwithstanding counsel's assertion to the contrary is of smaller diameter than the inlet pipe 16) an auxiliary oil outlet pipe 20. However, counsel fail to take into consideration the fact that *the oil level shown by the dotted line of Fig. 1 of Bray completely covers the outlet through pipe 20. There is, therefore, a locked space in the chamber above the oil level which normally closes this auxiliary outlet 20.* True, some pressure, when the same is excessive, may be relieved through the pipe 20, but nevertheless, obviously, there will be considerable pressure above the oil level before the same becomes so excessive as to force the oil upward and out through the pipes 21-22. It surely takes *some* pressure to thus force the oil out through the auxiliary outlet. Remember again, that Trumble provides *for no specific amount of pressure*, and even the slightest pressure within the chamber over atmospheric pressure will meet the Trumble claims.

Counsel's discussion of the case of Standard Oil Company v. Oklahoma Natural Gas Company (Plaintiffs-Appellees' Br., p. 62) is based upon error.

Is not the Trumble device for forcing the lighter series, **namely, among other things, gasoline, from**

the natural gas into the oil? Trumble like Saybolt sought to prevent the escape of the gasoline with the gas. We submit the principle is precisely the same in both the Trumble and Saybolt patents. Trumble *takes the gasoline out of the gas* and puts it in the oil, or he prevents it from escaping from the oil. It is totally immaterial which. Obviously, no one can tell just what proportion of gasoline is squeezed from the gas into the oil, or is prevented from leaving the oil in any of these pressure separators, like Cooper, McIntosh, Newman, Trumble, and others.

Conclusion.

We agree with counsel in the applicability of the quotation from *Topliff v. Topliff*, 145 U. S. 156:

“The object of the patent law is to secure to inventors a monopoly of what they have actually invented or discovered * * *.”

Trumble actually invented or discovered nothing but the specific form of his imperforate conical spreader plate and means for spreading the oil in a thin film upon the plate and equally around and upon the walls of the separator in an unagitated and unbroken up and unsprayed condition. He did not invent simply pressure and the flowing of the oil, either separately or in combination. To construe his patent so broadly would confer upon him by judicial construction and decree that which he distinctly disclaimed as his invention before the Patent Office, and would

grant to him that which clearly belongs to this defendant as a member of the public.

We submit, that the decree appealed from should be reversed and the cause remanded with directions that the bill be dismissed for want of equity at appellees' costs.

Respectfully submitted,

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